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Thirty-first session

SUMMARY RECORD OF THE 641st MEETING

Held at Headquarters, New York,
on Friday, 5 June 1998, at 3 p.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

ORGANIZATION OF WORK

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98-80763 (E)

The meeting was called to order at 3.10 p.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/444/Add.5)

1. The CHAIRMAN invited the Commission to resume its consideration of draft chapter IV of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.5).

Paragraphs 2-6 (continued)

2. Mr. AL-ZAID (Observer for Kuwait) said that recommendation 2 should perhaps include a reference to parliamentary procedures. In his country, authorization by the legislature was necessary for major projects. The content of recommendation 14 on duration should be referred to under general considerations (section A). The recommendation should also mention the conclusion of the project agreement.

Paragraphs 8-21

3. Mr. TELL (France) proposed substituting "effective" for "expeditious" in recommendation 3 and its corresponding paragraph 11. He said that in his country expeditious proceedings would lead to a decision on expropriation in one hour; he did not believe that that was the intent of the provision. The editing change would also tone down the disagreeable reference to court proceedings. Hundreds of people could be affected by expropriations connected with large-scale projects; their rights must be protected.

4. Mr. WALLACE (United States of America) said that the term "expropriation" was inappropriate, as it implied expropriation of foreign investments. In the American system, the terms "eminent domain" or "condemnation" were used. Compensation of the landowner was an issue that must be treated very carefully (for example, in para. 16).

5. The second sentence in paragraph 10 struck him as odd. It would seem that if a Government decided to proceed with a project, it would be prepared to make the land available to the project company. In paragraph 15, easements might be more applicable to the transmission of power rather than power generation. Referring to recommendation 5 and the second sentence of paragraph 21, he said that investors would need to be reassured about the duration of exclusivity arrangements or the possibility of obtaining them at a later date. Rather than relying on "changes of circumstances", the draft agreement should encourage the adoption of legislation permitting contractual arrangements in that regard.

6. Mr. RESTREPO-URIBE (Colombia), responding to one of the points raised by the representative of the United States, said that there was no alternative term for the equivalent of "expropriation" in Spanish and failure to use it would give rise to confusion.

7. Mr. GUISLAIN (Observer for the World Bank) drew Commission members' attention to the World Bank publication entitled "Concessions for

infrastructure: A guide to their design and award", which he could provide them.

8. Referring to paragraph 10 of the text before the Commission, he said that the World Bank, placed a great deal of emphasis on the vital and sensitive issue of resettlement in expropriation proceedings; that went beyond the dispossession of land and might even require a government to provide alternative housing to uprooted persons. He agreed with the United States representative that the reference to power generation in paragraph 15 might be erroneous and suggested the broader term "power sector".

9. Exclusivity was a major policy issue that should be determined by legislation rather than by negotiations with the project company. Consumers, users and competitors must also be parties to the debate. Some legal systems placed a time limit, for example, four or five years, on exclusivity or designated certain sectors that could be opened up to competition or concessions on an exceptional basis. In his view, the scope of exclusivity should be as narrow as possible and the time limit as short as possible. The recommendation on exclusivity and its accompanying paragraphs should include a reference to the fuller discussion of the topic in chapter II (A/CN.9/444/Add.3).

10. The statement in the final sentence of paragraph 20 was true; however, such concerns were normally taken into account in the initial design of a project. The existence of parallel roads was not uncommon; he was therefore surprised to see the question discussed in that context.

11. Mr. CHOUKRI (Observer for Morocco) suggested specifying, in paragraph 14, that expropriation was in the public interest. He said that would make the procedure more justifiable and would also avoid confusion with other procedures, such as confiscation, which was punitive and did not involve compensation.

12. Ms. GUREYEVA (Russian Federation) requested the secretariat to clarify, in connection with the first sentence of paragraph 17, who was given the right to operate the infrastructure as well as the meaning of "competing infrastructure". She wondered whether it was another project of the organization. The words "competing infrastructure" in the first sentence of paragraph 19 appeared to indicate that some other company or organization could carry out a parallel project. That wording gave rise to confusion as to whose rights were involved and under what conditions they could be exercised. Clarification would be appreciated.

13. Mr. ESTRELLA FARIA (International Trade Law Branch) responding to the request for clarification made by the representative of the Russian Federation, said that paragraph 17 set forth the right to operate the infrastructure, which was in itself exclusive. Where another infrastructure operated parallel to it - for example, in the case of a toll road and another parallel road - each operator had exclusive rights with respect to its own operation. The question, however, was to what extent the first infrastructure was affected by the parallel infrastructure.

14. Ms. GUREYEVA (Russian Federation) also questioned the appropriateness of the term "enabling legislation" (para. 18), which was not recognized in her country's legal system. She said that a more neutral term was needed.

15. Ms. FOLLIOT (France) said that her delegation felt strongly about retaining the term "expropriation", which, under French law, was perfectly adapted to the context: it involved the legal disposition of property, for compensation, in the public interest. The question of exclusivity was difficult inasmuch as it implied the possibility that the contractual conditions of implementation could be amended.

16. Mr. KOVAR (United States of America) said that the term "expropriation" was clearly unsuitable in English. In the United States legal system, the terms "eminent domain" or "condemnation proceedings" reflected the concept of taking property for a public purpose, providing due process in some judicial form, and paying compensation. He believed that that concept was recognized in international law and in all legal systems.

17. The term "expropriation", on the other hand, had relatively negative connotations in English. In the draft agreement, "expropriation" was sometimes used in a context that implied that due process of law or compensation were not necessary. For example, the last sentence of paragraph 10 seemed to indicate that expropriation did not involve a purchase of land. Similarly, compensation would unquestionably (and not "might") be an obligation if the use of property by its owner was substantially hindered (para. 16). He agreed with the representative of France that recommendation 3 and paragraph 11 should not refer to "expeditious" proceedings, which could be interpreted to mean that compensation was not necessary in the interest of speed.

18. Ms. ALLEN (United Kingdom) strongly supported the representative of the United States with regard to the usage of the term "expropriation". The term had negative connotations in English and did suggest that no compensation was necessary. "Eminent domain", however, had no meaning in her country's legal system, which employed the term "compulsory purchase" in such cases.

19. Mr. RENGER (Germany) said that the choice of terms should not be determined by the usage in one State alone. In Germany, there could be no expropriation without compensation. In the final sentence of paragraph 10, he understood the concept of purchase, as a legal requirement, to be implicit in the term "expropriation".

20. Mr. LALLIOT (France) proposed that, since Commission members seemed to agree on the concept in substance, the secretariat should find an appropriate generic term for use in the draft agreement.

21. Ms. MUSOLINO (Australia) said that the term "expropriation" was commonly used in her country in the context of bilateral investment treaties. She suggested using the phrase "expropriation against just compensation".

22. Ms. PIAGGI DE VANOSSI (Argentina) agreed with the representative of Germany, and said that her delegation would not oppose changing the terminology.

In that regard, she believed the Australian proposal would dispel all remaining doubts.

23. Mr. KOVAR (United States of America) reiterated that "expropriation" had a negative connotation in some Anglo-Saxon legal systems. Since it was often interpreted as "the taking of property of a foreign national by a Government", and that was not the meaning those particular paragraphs sought to convey, the expression "compulsory purchase", as used in the United Kingdom legal system, would be an apt replacement. Alternatively, the Commission could pursue the French proposal of asking the secretariat to substitute a generic term for "expropriation".

Paragraphs 22-34

24. Ms. ALLEN (United Kingdom) said that the idea of authorization of the host Government to award projects to foreign companies, as stated in the second sentence of recommendation 6, had not been reflected in either paragraphs 26 or 27.

25. She also pointed out that there was no recommendation corresponding to paragraph 28. As the timing of the establishment of a project company was a fairly relevant issue, she hoped it would be possible to formulate a recommendation on that part of the text.

26. Mr. RENGER (Germany), referring to the first sentence of paragraph 22, said that the legal status of a concessionaire should be established before the conclusion of a project agreement, and was not an issue to be negotiated in the agreement itself.

27. Mr. WALLACE (United States of America) said that the comment made by the representative of the United Kingdom on the second sentence of recommendation 6, related to a reference to foreign participants made at an earlier meeting. He presumed that foreign participants would be treated on an equal footing with their domestic counterparts.

28. Turning to the establishment of legal status, he said that the creation of independent legal entities was common practice, and was sometimes required by many Governments. Among other reasons, sponsors or investors often preferred to create a separate legal entity in order to protect their limited liability.

29. With respect to paragraph 27, he said investors might make indemnity arrangements among themselves, but that was an aspect which would not necessarily fall within the purview of the host Government.

30. Debt-equity ratio was, in his opinion, more important than the notion of "minimum capital", as cited in paragraph 30. For their own protection, lenders would insist on equity, otherwise their projects might be too highly leveraged.

31. He believed investors would object to the implications of the last sentence of paragraph 32, as they usually wished to have the freedom to structure their companies as they saw fit. Similarly, the issue of a Government as a "privileged shareholder" and government involvement in the voting structure of

companies, raised in the third sentence of paragraph 33, was likely to meet some resistance from investors and lenders, particularly from those which were not accustomed to dealing with governments in commercial operations.

32. It might be advisable to limit the principle of "effective control", within the meaning of paragraph 34, since investors or principal shareholders might not understand why an equipment supplier or subordinate member of a group could not be replaced without government approval.

33. Mr. RESTREPO-URIBE (Colombia), commenting on the relationship between the project agreement and the legal status of concessionaires, said that the content of the project agreement would define and specify the substance, scope and conditions of the powers and attributes granted by the applicable legal regime.

34. Paragraphs 22 and 23 should be redrafted to indicate that concessionaires were not required to be members of consortia. In principle, it was possible that a concessionaire could be a single entity or a number of legal persons forming an association. However, from his own experience, it was more usual for a legal entity to submit its candidature as a member of a consortium, simply because it would be better equipped to combine technical expertise with the banking and investment components which were crucial to the implementation of projects.

35. He pointed out that the term "accionista" (shareholder) was used throughout the text, but he preferred the concept of "participación" (participation), or an explanation that reference was being made to "socios" (members) or shares of interest.

36. Mr. LALLIOT (France) agreed that the issue of concessionaires should be clarified. He also shared the view stated by the representative of Germany on paragraph 22. The purpose of the project agreement was certainly not to establish the legal status of the concessionaire, which should be settled in advance, either at the pre-selection phase or by domestic law.

37. Mr. GUISLAIN (Observer for the World Bank), also commenting on paragraph 22, said that his own organization would not agree to lend to a consortium which had not been incorporated and, in addition, a shareholders' agreement would normally be requested as documentation.

38. He suggested that the second sentence of recommendation 6 should be deleted.

39. The issue of prescribing a "fixed sum" as minimum capital (para. 29) would have to be considered in a broader context, along with lenders, overall equity-debt ratio, and other elements that could reassure the awarding authority of the sponsors' commitment to the project. Focusing on one single aspect would not be entirely useful.

40. Although the idea of the Government's role as "privileged shareholder" (para. 33) was not advisable, if such reference were to remain in the document, the matter should be treated as a veto held by the Government over selected issues that might arise within the board of the company.

41. Mr. ESTRELLA FARIA (International Trade Law Branch) thanked delegations for pointing out the weaknesses in the text; their comments would greatly assist the secretariat in revising the final version of the document.

42. The secretariat was aware of the sequence of events and the time lapses between the granting of a concession and the establishment of a project company. It had reviewed a number of major projects in which a pre-commitment, laying down the conditions under which the project company would later be established, had been signed by the winning consortium.

43. He recalled an earlier comment that it might be useful for Governments to grant to project companies the rights, privileges and facilities that were necessary to build infrastructure and operate services. Therein lay the meaning of "legal status", as it appeared in the document. In some systems, an operator of public services enjoyed a number of rights and prerogatives in order to ensure continuity of the services granted under the concession, through the project agreement.

The meeting was suspended at 4.25 p.m. and resumed at 4.55 p.m.

Paragraphs 35-48

44. Mr. WALLACE (United States of America) said that it would be more accurate to replace the words "project company" in the text of recommendation 12 by "Government". Recommendation 14, on duration, was merely illustrative and national legislation should also contemplate other topics, such as investments, tariffs and guarantees.

45. Turning to the notes on the legislative recommendations, he said it might be useful to include after the words "not freely transferable" in the first sentence of paragraph 35 the words "other than assignment as security to lenders". The guide should also provide for host Governments to use objective criteria for withholding approval for such assignments. It might even go so far as to provide that the consent of the Government should not be unreasonably withheld or should be deemed to have been given if not denied within a period of 90 days.

46. With regard to paragraph 38, on the method for selecting a subconcessionaire, if the effect of such selection was to replace the concessionaire, then the host Government might be justified in making the award of subconcessions subject to strict criteria. If, however, a subconcession was awarded for the purpose of providing a separate ancillary service, such as restaurant services along a toll road, then the host Government would have less justification for withholding permission.

47. On the subject of security interests (para. 39), he said the project company would normally have an interest in being able to pledge to the lender all or some of the assets, property and rights that arose out of the concession and the lender might wish to use the assets or property or to exercise the rights in question. The effect of the guide's legislative provisions should therefore be to reduce the Government's ability to withhold its approval.

48. On the question of duration, it was not a good idea to limit the duration of infrastructure concessions to a maximum number of years. Instead, the field, which was a new one, should be governed by broader and more flexible provisions and host Governments allowed to decide on the duration of the concession period.

49. With regard to specific terms (para. 48), he did not believe that the guide should contemplate all of the many provisions of a project agreement, although the legislator might wish to be made aware of the types of issues that were covered by the project agreement.

50. Lastly, the draft guide did not cover the possibility of a project's collapse, an omission which could perhaps be remedied by the inclusion of a buy/sell provision.

51. Mr. RESTREPO-URIBE (Colombia) said that, even though a number of countries had found it desirable to adopt legislative provisions limiting the duration of infrastructure concessions, the duration should not be limited for subjective reasons.

52. Mr. CHOUKRI (Observer for Morocco) said that he had certain reservations about permitting a project company to use its shares as security. Shares represented fractions of the capital of a company and their value could drop to the point where they no longer constituted a guarantee for the lender.

53. Ms. GIOIA (Italy) said that she shared the concern just expressed by the Observer for Morocco. Italian legislation did not permit the use of shares as a form of security, and the inclusion of such a provision in the guide would undermine the effectiveness of its implementation in Italy.

54. Mr. LALLIOT (France) said that a concessionaire should be required to obtain the host Government's prior approval in order to avoid situations in which the responsibility to carry out a particular activity was transferred to an entity not chosen by the Government. French law was fairly flexible with regard to the duration of the concession and essentially linked duration to the nature of the contract. The current formulation in the draft guide offered a prudent balance and should therefore be retained.

55. Mr. GUISLAIN (Observer for the World Bank) said that a clear distinction should be made between a subconcession and a subcontract. The former raised the issue of the liability of the subconcessionaire, while the latter did not. On the subject of security over shares of the project company, such security was commonly required by lenders in project finance transactions and general prohibitions on its establishment might unnecessarily limit the project company's ability to raise funding for the project. The law should therefore permit the project company to create such security.

56. On the subject of duration, he said experience had shown that the duration period was always too short and always created problems, especially if the project involved heavy infrastructural works. The reference in paragraph 46 to countries which had found it desirable to adopt legislative provisions limiting the duration of infrastructure concessions to a maximum number of years should

therefore be omitted or a caveat inserted about the risk which that limitation represented.

57. Paragraph 48, on specific terms, contained a number of elements which did not belong in legislation. The Commission should give careful consideration to those elements of which legislators should be aware, but which should not necessarily take the form of legislative provisions.

58. Mr. WALLACE (United States of America) said that he fully shared the views just expressed by the Observer for the World Bank. The guide must provide for the establishment of security interests over the shares of the project company, since lenders would insist on such security as the easiest way for them to gain control of the entire operation. He agreed, however, that Governments might wish to provide for prior government approval of the establishment of such security interests. Lastly, the term "project company" in the last sentence of paragraph 44 should be replaced by "Government".

59. Mr. LAMBERTZ (Observer for Sweden) said that he too entirely endorsed the statement just made by the Observer for the World Bank.

60. Ms. FOLLIOT (France) said that the problem with liens and other security interests was the different nature of concession agreements. In the case of build-operate-transfer contracts, ownership was transferred to the public entity at the end of the concession period and it was therefore possible to establish a security interest over the shares of the project company during the construction and operation phases. Under French law, however, the public entity was the owner of the infrastructure project from the inception of the contract. That concept of public ownership therefore precluded establishing security over assets that were in the stage of construction.

61. Mr. OLIVENCIA RUIZ (Spain) said that the tone of paragraph 35, on assignment of the concession, was descriptive and should therefore be brought into line with that of recommendation 9, to which it was related and which was more prescriptive in tone.

62. In addition, the Spanish term "enfiteusis", which was used to render the English expression "leasehold interest", in paragraph 41, was archaic and should be replaced by a term such as "usufructo".

63. With regard to paragraph 45, on the question of security over shares of the project company, Spanish law prohibited a company from using its own shares as security, although shareholders were allowed to use their shares as collateral.

64. Ms. PIAGGI DE VANOSSI (Argentina) said that she supported the comment by the representative of Spain concerning the Spanish terms "enfiteusis" and "usufructo".

65. Ms. FOLLIOT (France), referring to the remarks by the representatives of Spain and Argentina concerning the word "enfiteusis" in the Spanish version of paragraph 41, said that in French "bail emphytéotique" would be quite acceptable as a term for "leasehold interest" as it had recently come back into use in the management of State-owned lands. However, the phrase "bail d'usage" in the

current French version of the paragraph was more general and perfectly satisfactory. With respect to the final sentence in paragraph 41, she said that in the French text the phrase "titre foncier des terrains tenants ou aboutissants" ("title to adjacent land") was perplexing.

66. Ms. GUREYEVA (Russian Federation) said, in relation to the point raised by the United States delegation about conditions for terminating a project, that the interests of the host Government and the concessionaire must be kept in balance.

67. Referring to comments by the Observer for Sweden, she said that issuing strict recommendations to Governments should not be the goal of the Commission; if the Commission included in its guide only those provisions that Governments must later incorporate in their law, the guide would become a strictly binding document, and that would be far from desirable.

68. Mr. ESTRELLA FARIA (International Trade Law Branch), referring to the comments made by the United States delegation on paragraph 48 said that the secretariat's main focus in drafting the paragraph had been on the extent to which legislation was relevant for the implementation of a project agreement; the idea had been not that the lawmakers should write the contract, but rather that they should focus on what should go into the contract that also required treatment in legislation.

69. The issues dealt with in the document up to paragraph 47 were ones which in the view of the secretariat typically appeared in legislation, but nevertheless there was some interplay between chapter IV of the guide and following chapters. Paragraph 48 should be looked at in conjunction with document A/CN.9/444, on the structure and contents of the guide, because it might be useful to combine some later chapters that currently stood alone into chapter IV, specifically, those including performance by the parties, default by concessionaires, default by Governments, government support and such other issues as would appear in a project agreement. Thus, the secretariat could not proceed to work on future chapters without guidance from the Commission.

ORGANIZATION OF WORK

70. The CHAIRMAN requested the Commission to give its instructions on how it wished to proceed in terms of the structure of the guide, and on the manner in which it wished to work on completing the guide.

71. Mr. KOVAR (United States of America) said that the guide needed reorganizing and refocusing around its central purpose of providing guidance to legislatures and to those who drafted legislation in the various countries contemplating the use of private financing for infrastructure projects, as the use of private financing would in some cases require changes in laws or constitutions. Where the guide tried to cover too many topics, its focus was lost.

72. As currently drafted, the legislative recommendations at the beginning of the guide's chapters were not truly effective: to provide focus and guidance, the Commission should try to draft legislative principles, not in the form of a

model law but rather in the form of sample provisions on key topics, perhaps providing a menu of options to avoid appearing overly prescriptive.

73. His delegation had no strong views on how many chapters the guide should have and how they should or should not be combined. Future chapters could possibly be successfully amalgamated with those already discussed, providing the principle of keeping the focus on the guide's purpose was kept in mind and if there was a shift of emphasis from legislative recommendations to sample provisions.

74. On the subject of working methods, his delegation believed that there was a clear need for a working group composed of representatives with expertise on the various difficult technical issues in question. The working group should work in a less formal manner than the Commission at its formal sessions. Also, the secretariat should work together with other types of experts in the preparation of documents to lay before the working group, in which task his delegation was willing to assist.

75. Mr. TELL (France) referred to his delegation's earlier remarks on the structure of the guide. The debate on the guide's structure should not be reopened because it had already shown that there were no items requiring sample provisions.

76. Concerning the method of working on the guide, he recalled that his delegation had already expressed reservations on entrusting the work in question to a formally established working group. In that connection, he noted that after completion of the Model Law on insolvency the working group on that subject had been dissolved, so there was nothing to be done on that matter. Also, the work being carried out by the Working Group on Electronic Commerce and the Working Group on International Contract Practices had been given high priority with a view to enabling them to continue developing uniform rules in their areas, and had considerable work left to do. Thus, in 1999 the Commission would face as a main task only adopting the guide because the draft convention on assignment in receivables financing would not be ready for submission. The situation was therefore rather difficult, also because there was some uncertainty as to the legal status of the working group that some wished to establish and therefore as to how long it could last in a context of budget cuts.

77. Concerning the working group's legal status, it was a moot point whether it was legally possible for the Commission to do whatever it liked in setting up working groups. When, where and how often such a working group should meet were also moot: the representative of the United States apparently had more than one meeting in mind. The French delegation might conceivably stretch to a maximum of two meetings to be held in one week, but going into long negotiations with a formally established working group would be out of the question. Even then, and assuming that a working group was established and that it carried out work which the Commission itself did not cover, the Commission would need to meet for a day or two just to approve its work, and he wondered if that was what the secretariat really wanted.

78. Given the diverse nature of the subjects dealt with in the guide, many of which involved questions of private law as well as public, and the large number of those subjects, any working group dealing with the guide would have to have its dates for meeting and its agenda properly fixed in advance so that States could ensure that the right experts were there when the issues within their purview were covered.

79. With those reservations, pending clarification from the secretariat and the provision of precise assurances to the Commission, his delegation would not oppose the establishment of a group to meet once to complete the remaining chapters in preparation for the next plenary session of the Commission.

80. Mr. LAMBERTZ (Observer for Sweden) said that he concurred with the representative of the United States in respect of the structure, contents and focus of the guide. However, it might prove difficult to draft sample provisions and the legislative recommendations should probably be retained for reasons of feasibility in the time available.

81. The Commission should take care in the guide not to duplicate the work of other organizations; he drew attention in that connection to paragraph 225 of the Commission's report on the work of its twenty-ninth session (A/51/17), which referred specifically to the guidelines being prepared by the United Nations Industrial Development Organization (UNIDO). He believed that rather than have texts in the guide similar to the guidelines, the guide should instead contain references to the guidelines. Indeed, it would be strange if there were no such references because the Commission and UNIDO should cooperate with each other and promote each other's work. The guide and the guidelines should not duplicate but rather complement each other, so that they could be used in conjunction. Also, the Commission must take care to ensure that there were no contradictions to the guidelines within the guide; he was confident that the secretariat was well aware of the guidelines and was taking care that no such contradictions arose.

82. He supported the representative of the United States also in his suggestion of establishing a working group, but that working group should have a very strict mandate and should need only one session to work on new documents prepared by the secretariat with expert assistance. When it had done its work, a further set of new documents would be similarly prepared for submission to the Commission at its thirty-second session. However difficult the task, the Commission should aim to complete the guide in 1999.

83. Mr. RENGER (Germany) observed that the chapters so far discussed needed revision and that forthcoming chapters had yet to be drafted. He believed that the current session of the Commission had dealt successfully with chapters drafted by the secretariat with the assistance of experts who had vital practical rather than academic knowledge. That same practice should continue for future chapters: establishing a working group would not on its own solve the problem, the secretariat could not draft the new chapters on its own and providing expert help for a working group would create the logistical and organizational problems mentioned by the representative of France. He wondered if a working/expert group might be convened in the first half of 1999 for a week at most, assuming there was strong support for such a method of working, to go through the new chapters drafted in the interim by the secretariat, with expert assistance.

84. Mr. LIU Yang (China) said that his delegation supported the suggestion put forward by the representative of the United States in respect of how the Commission should proceed: a working group was necessary because of the large number of issues before the Commission under the item under discussion. However, a number of issues remained to be settled before a working group could be established because the working group must have a clear goal: the Commission must decide beforehand whether the working group was to develop a model law, perhaps, or whether, as the representative of the United States appeared to suggest, it should develop a menu of provisions. Also, the rules of procedure for the group must be established. He believed that the Commission needed clarification of those issues from the secretariat before it could make an informed decision.

85. Mr. HERRMANN (Secretary of the Commission) said that for the secretariat the question in respect of working methods for developing the guide had been whether to leave the discussion to the Commission at its thirty-second session, bearing in mind that it was very probable that the Commission would have no other main topics to cover at that session, as pointed out by the representative of France. The secretariat's initial plan had been that at that session the Commission would discuss the chapters that had been revised by the secretariat in the light of the input from the current session, and most if not all of the chapters still awaiting preparation.

86. He explained that the secretariat could convene expert groups and obtain expert assistance whether or not the Commission instructed it to do so, and that the composition and other arrangements for such groups lay within the discretion of the secretariat.

87. If a working group was convened, tentatively in January 1999, the only arrangement that would make financial sense and justify travel costs would be for the group to meet for two weeks as a normal working group of the Commission. It would not be appropriate to tinker with the structure or type of meetings: all member States would be represented, and the level of formality and the language coverage could not be altered. Organizing such a working group was possible from the administrative and financial points of view, but before the Commission took a decision it should weigh up the advantages and disadvantages of organizing such a working group in the light of the degree of importance it wished to accord the project.

88. He suggested that establishing a working group would not per se indicate greater importance for the project because to keep it at the Commission level would itself be indicative of high priority. In practical terms, the workload on the secretariat would be approximately equal as the same amount of work would have to be done whether dealt with entirely at the Commission level at the next session or split between that session and an earlier working group. However, against the notion of organizing a working group was the interdependence between the chapters, meaning that the more that could be prepared together, the better, and the possibility that overall no time would be saved, given his estimation that the secretariat could draft perhaps three new chapters by the time such a working group would meet. The Commission must therefore also ask itself whether three chapters were worth a two-week session.

The meeting rose at 6.10 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 642nd MEETING

Held at Headquarters, New York,
on Monday, 8 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

ELECTRONIC COMMERCE

This record is subject to correction.

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98-80772 (E)

The meeting was called to order at 10.15 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

Organization of work

1. Mr. HERRMANN (Secretary of the Commission) said that the proposal to convene a working group in January 1999 to review chapters of the draft legislative guide called for further consideration. Earlier that morning, a number of members had met informally to discuss the matter and had generally agreed that it would be best for such a review to be conducted by the Commission in plenary meeting at its next session, in 1999. By January 1999, the secretariat could reasonably hope to complete only three more chapters, which was insufficient material for a two-week working group and would entail additional expenses for Governments.

2. Furthermore, only plenary meetings of the Commission were entitled to summary records; working groups were not. In the past, when a project had been considered partly in plenary meeting and partly in a working group, it had proven difficult to cope with the fragmentary nature of the records. The fact that a project was not referred to a working group did not mean that it was of lesser importance, but in fact the contrary. In addition, the guide should be an integrated, coherent document with chapters that were interdependent, both in concept and in terminology, a goal which would be best furthered if the guide was reviewed at all stages by the full membership. Members should be aware of the great amount of work that went into the preparation of each of the chapters; the work of the legislative guide on privately financed infrastructure projects was the most demanding and time-consuming of the many UNCITRAL projects he had been associated with.

3. The Commission should estimate the number of days it would need to devote to the draft legislative guide at the next session; that would depend, of course, on the number of chapters the secretariat was able to complete. In addition, whether the Commission met in 1999 for two or three weeks would depend on what other topics called for discussion during that session.

4. The proposal that model provisions should be drafted to accompany the legislative guide also called for further discussion. To formulate the occasional sample provision was one thing; it was quite another to draft all remaining recommendations as model legislation, which would in essence be tantamount to creating a model law. Such an approach would significantly delay the completion of the guide. Furthermore, the Commission was likely to find that the establishment of concrete model laws was perilous; in such matters as arbitration, procurement, and solvency, there had existed a standard and discrete body of law on which to draw. Such was not the case with privately financed infrastructure projects, where legislative approaches varied widely from country to country. The development of model legislation would significantly alter the nature of the project under way.

5. Ms. SABO (Canada) said that the previous week's deliberations had shown that the draft legislative guide represented more the views of the private

sector than of Governments, and that its consideration by the Commission allowed for the views of Governments to be incorporated. That should not be construed as a criticism of the secretariat, but merely as an observation. Since the working group tentatively scheduled to meet in January 1999 would probably be unable to complete consideration of the guide, that task should logically be resumed at the Commission's session to be held later that year. That would also give the secretariat more time to complete its work. Canada would gladly recommend a number of experts in both the private and government spheres who could assist with the task.

6. At an earlier session, the Commission had determined that it would be all but impossible to produce model provisions in the area of privately financed infrastructure projects because existing laws were so varied. She agreed with the Secretary that model provisions might be incorporated at certain places in the text, but no effort should be made to insert such provisions systematically throughout. The Commission should strive to assemble an efficient, easy-to-use group of legislative recommendations that reflected the range and diversity of existing approaches.

7. Ms. ALLEN (United Kingdom) said that the Commission should balance its work on the draft legislative guide with other projects before it, such as those in the areas of electronic commerce and accounts receivable. Her delegation agreed that the guide should be considered at the Commission's regular session in 1999, then considered by a working group, and then briefly reviewed at the Commission's session in 2000. Her Government held no strong views concerning the formulation of model provisions and would defer to those countries which could make more practical use of such devices. For its part, the United Kingdom did not intend to use the guide to assist it in formulating a legislative framework. Care should nevertheless be taken in the choice of language; the word "should", employed throughout, was too categorical. The guide should make suggestions, not issue directives.

8. Mr. OLIVENCIA RUIZ (Spain) said that the Commission must complete the task it had embarked on: that of creating a legislative guide which included legislative recommendations. A decision on the formulation of a model law should be deferred until after completion of the guide. In any event, the process of creating model provisions or attempting concretely to define legislative policy would necessarily be difficult and politically awkward; it was far better to offer guidance in an impartial and informative manner. The Commission could, once it had the whole draft guide before it, determine whether or not a working group should be convened. Furthermore, changing the direction of the project at the current time was certain to have financial implications.

9. Ms. NIKANJAM (Islamic Republic of Iran) said her delegation believed that, in the short term, it would be better for the Commission to concentrate on the preparation of sample provisions that Governments could refer to when amending their legislation. In the long term, the legislative guide would be of use in harmonizing national legislation. At its next session, the Commission should continue its discussion of the draft guide.

10. Mr. MARKUS (Observer for Switzerland) said that his delegation believed there was no need for an additional working group at the current stage, and it

hoped that the Commission at its next session would be able to complete its work on the draft chapters of the guide. Instead of preparing model provisions, the Commission should concentrate on drafting more precise principles that countries could transform into legal provisions. The structure of the entire guide would have to be changed so that the legislative recommendations were separated from the notes; that would enable interested parties to read the principles as model laws, without having to refer to explanatory notes.

11. His delegation supported the statement made by the representative of the United Kingdom with regard to the need to make the tone of the legislative recommendations less prescriptive. The Commission should not make policy recommendations but rather provide alternative principles that could be transformed into model provisions. That would give Governments an opportunity to choose which principle best suited their needs.

12. Mr. AL-NASSER (Observer for Saudi Arabia) said that his delegation believed that the guide would not be accepted by a large number of States, especially States that did not have a great deal of legislative experience. Some delegations had implied that States might not accept the guide because it interfered in their public policy. The preparation of model laws might be useful for States with little legislative experience.

13. The experts who drafted the chapters of the guide came from countries that had a more developed legislative tradition. While Africa and Asia had some expertise in the matter, it was not at a level that would allow African and Asian experts to participate in the drafting of model laws. His delegation had requested that representatives of the International Monetary Fund (IMF) should be sent to Saudi Arabia to share their expertise, since Saudi Arabia was very interested in the guide.

14. Mr. CHOUKRI (Observer for Morocco) said that as the guide could be useful both to the host country and the private sector, work on it should not be delayed. His delegation wished to know whether chapters that had already been approved would be revised in the light of the drafting of new chapters. He also wished to know whether a unified text of the chapters that had already been discussed would be made available to delegations.

15. His delegation was not in favour of drafting a model law, since that was a very complex and time-consuming undertaking. In that connection, he wished to know whether the secretariat had the practical and financial means to transform the draft guide into a model law. If the Commission decided to draft a model law, his delegation would not be opposed to such a decision.

16. His delegation supported those delegations that believed that the language of the guide should not be prescriptive.

17. Mr. ADENSAMER (Austria) said that the Commission did not need to establish a working group, since it could discuss the remaining chapters of the draft legislative guide at its next session. Timely receipt of the necessary documents would facilitate coordination.

18. It was not practical to prepare a model law on privately financed infrastructure projects, and it would not be helpful to include sample provisions, since Governments would most likely have to make changes in diverse areas of their legislation. The draft guide should address policy issues, since it was impossible to adopt legislation without policy decisions. Governments must understand that, if they wished to engage in privately financed infrastructure projects, they would have to make the requisite policy changes. His delegation did not believe that it was necessary to streamline the guide.

19. Mr. ALABRUNE (France) said that his delegation was not in favour of establishing a working group at the current stage. The Commission could continue its discussion of subsequent chapters of the guide at its next session, at which time it could decide on the usefulness of establishing a working group. Nor was there any need to draft a model law; the guide should give countries a choice of principles on which they could base their legislation. Moreover, it would be easier to reach a consensus on a legislative guide than on a model law.

20. Mr. LAMBERTZ (Observer for Sweden) said that the Commission should decide at its next session whether or not to establish a working group. It was not useful to transform the draft guide into a model law, since such a project could not be completed in a reasonable amount of time. The Commission's report on the work of the current session should include a discussion of the advantages and disadvantages of model provisions. The Commission secretariat should formulate 20 or 25 core principles of the legislative guide and, where appropriate, should prepare a number of model provisions that could later either be removed, if delegations objected to them, or transformed into principles. The principles should not be worded in a prescriptive manner.

21. Mr. RENGER (Germany) said that there was no need for the Commission to halt its work on the legislative guide and begin drafting a model law. The preparation of model provisions would incorrectly suggest that those provisions covered all aspects of the subject. Once it finished drafting the legislative guide, the Commission could consider the question of preparing model provisions.

22. Mr. KOVAR (United States of America) said that the developed countries should recognize that the purpose of the guide was to provide assistance to developing countries and countries with economies in transition that were looking for private capital to provide services that in the past had been funded by the public sector. For the draft guide to be as helpful as possible to potential host Governments, it should include a number of models and principles that Governments could use as a starting point for amending their legislation.

The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

23. Ms. GUREYEVA (Russian Federation) said that in view of the explanations given by the secretariat, a regular session of the Commission would probably offer a better solution than a working group. In the meantime, the secretariat could draw on the advice of experts in preparing subsequent chapters of the draft guide. However, the composition of the expert group should be balanced, including representatives from regions other than the group of Western European and other States.

24. Her delegation believed that the final product should take the form of a legislative guide, since the task of the Commission was to help developing countries devise their own legislation. Model laws or model provisions, even if framed in the spirit of economic cooperation, could easily become mere statements of policy, and that was not the Commission's purpose. It had been asked whether the new chapters would contain revisions of the material already discussed by the Commission: obviously, future chapters must link into the existing ones to form an integrated whole. There could be no question of the secretariat turning the guide into a model law on its own initiative, since that was a matter for the Commission itself to decide.

25. There was also the question of the title of the document. As the representative of the United States had pointed out, the main focus of the draft was foreign investment; it might therefore be appropriate to amend the title to incorporate a reference to the potential role of foreign capital in infrastructure projects. She wished to know what the forthcoming chapters would be called, in order to have an opportunity to reflect on them. In addition, documents for the next session of the Commission should be made available well in advance, so as to save the Commission's time during that session.

26. The representative of the United States had said that the task of the countries in his regional group was to advise developing countries on how to attract foreign investment. But the real task at hand was somewhat broader, and should prove mutually enriching: finding appropriate ways of legislating in those countries to which, it was hoped, foreign investors would be attracted.

27. Mr. AL-ZAID (Observer for Kuwait) said that the excellent draft guide produced by the secretariat was already an integrated whole. To change it now into a set of model provisions or a model law would be a waste of time and effort. It would alter the nature of the text and render it more difficult to apply. Ultimately, the Commission itself must decide what form it should take. His own delegation was in favour of having a guide, but he would not dissent if the majority felt otherwise.

28. Ms. PIAGGI de VANOSSI (Argentina) said that she could not discern any consensus in the Commission but was herself inclined to the view expressed by the representative of Austria and the observer for Sweden. She did not favour setting up a working group at present. As for the structure of the document, it seemed that the more assertive the proposals it contained, the more difficult it would be for some delegations to support them. The end product should therefore be specific, but not dogmatic, in content. The key principles should be stated clearly and kept separate from the notes.

29. Mr. RESTREPO-URIBE (Colombia) said that in order to be of assistance to those engaged in privately financed infrastructure projects, the text produced by the Commission should be practical and aimed at facilitating the flow of capital to developing countries. It was also important to bear in mind the need to stimulate exchanges of resources between developing countries.

30. Mr. MARADIAGA (Honduras) said that the topic the Commission was now considering was of vital importance to many countries and should be given much wider publicity. Perhaps the Commission should actively seek such publicity,

since it was endeavouring to enable developing countries to make decisions which, irrespective of their technical and scientific implications, would be based on policy options. The secretariat could also help to speed up the implementation of international trade law by involving relevant individuals in the preparatory work. However, he did not favour establishing a working group, which might delay matters. The aim should be to produce an end product that would make it possible to incorporate the Commission's recommendations into the law of the host countries as quickly as possible.

31. Mr. HERRMANN (Secretary of the Commission) said that he wished to reply to the points raised. Concerning the structure and content of the draft guide, it had been generally agreed that the secretariat should draft the chapters along the lines that had been suggested; thus what was in the existing document reflected the future structure and contents. It was the secretariat's intention to revise the existing chapters of the draft guide, since that was the purpose of the discussion in the Commission. However, it was not clear how much time the secretariat was supposed to devote to preparing the new chapters and revising the old ones. The secretariat would prefer to prepare the new chapters first, but whether it did so depended partly on the time available, and it might well work on both tasks at once, in view of the linkages between the old and the new material. In that light, a specific mandate on timing would be unwise.

32. Concerning the balance of representation in the expert groups, there was no question of excluding certain groups of States. In the past, the secretariat had drawn upon experts from various regions. In practice, it was far from easy to get experts from Africa and Asia to attend meetings in Vienna or elsewhere in Europe. However, there were two ways of solving that problem: the need for travel could be avoided by using electronic mail, fax and the telephone as methods of communication; alternatively, since the secretariat's limited resources made it impossible to hold meetings in all regions, meetings could take place when the experts concerned had other reasons for being in Europe. He urged members to give the secretariat names of experts who could usefully be consulted.

33. On the question of the structure of the guide or model provisions, the mandate to the secretariat was still unclear, although it seemed that the idea of a model law could be discarded. He suggested that the secretariat might go through the legislative recommendations and condense them into a set of concise principles, making a clear separation between legislative recommendations and possible regulations to be considered. The secretariat could then prepare model provisions as appropriate. The main issue to consider was whether the advantages of preparing two or three possible variations of the model provisions would outweigh the disadvantages.

34. The CHAIRMAN, summarizing the discussion, said that in its future work, the Commission would harmonize the existing text. Many delegations favoured recommendations that resembled policy decisions, while others preferred that they should take the form of principles, but there was consensus on the need for a good product. The sense of the Commission was that the document could be retained as a legislative guide and that it was not yet necessary to establish a working group. A decision would need to be taken before the end of the current

session on extending the length of future sessions from two weeks to three weeks.

35. There was consensus among the officers of the Commission regarding the concern raised by the representative of Honduras at the lack of information disseminated at Headquarters about the Commission's session. Steps must be taken to ensure that summaries of its meetings appeared in the Journal. Private trade law was gaining in importance, and the Commission had a duty to see that its work became more widely known.

36. Mr. LAMBERTZ (Observer for Sweden) endorsed the statement by the Secretary and the Chairman's summary of the debate and said he would favour asking the secretariat to begin working on the guide as suggested.

ELECTRONIC COMMERCE (A/CN.9/446 and A/CN.9/450)

37. Mr. SORIEUL (International Trade Law Branch) introduced the report of the Working Group on Electronic Commerce on the work of its thirty-second session (A/CN.9/446). The Working Group had addressed general problems concerning the preparation of uniform rules on electronic signatures and, more specifically, the question of incorporation by reference. At its forthcoming session it would conduct the third reading of the text of the draft uniform rules on electronic signatures, which would be an important exercise. Its study of the feasibility of preparing uniform rules on digital signatures and certification authorities had yielded the conclusion that it would be possible to set rules, but that their scope should be expanded to include other forms of authentication. The Commission's task was to reconcile digital signatures and other forms of authentication into one set of rules that would apply equally to State and private organizations.

38. He also drew attention to a working paper which had been issued in English and was being translated into the other official languages, on the United States proposal to make the Model Law on Electronic Commerce into an international convention.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 643rd MEETING

Held at Headquarters, New York,
on Monday, 8 June 1998, at 3 p.m.

Chairman: Mr. MAZILU (Romania)

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ELECTRONIC COMMERCE

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 3 p.m.

ELECTRONIC COMMERCE (A/CN.9/446 and 450)

1. The CHAIRMAN invited Commission members to make general remarks on the report of the Working Group on Electronic Commerce on the work of its thirty-second session (A/CN.9/446).

2. Ms. ALLEN (United Kingdom) said that the United Kingdom Government was convinced of the need for uniform rules on electronic signatures and certification authorities; it was therefore supportive of the work of the Working Group, which it recognized as difficult and complex. It recognized also that there were differences between national positions. The latest working paper on uniform rules (A/CN.9/WG.IV/WP.76) pointed the way forward.

3. Despite the complexity of the subject, the United Kingdom Government believed that uniform rules should be agreed so that national policies could be determined. That latter process was already proceeding in the context of the European Commission, as illustrated by a proposal for a European Parliament and Council directive on a common framework for electronic signatures. Her delegation had therefore hoped that the Working Group would be able to finalize its work in time for the next session of the Commission.

4. Turning to the United States proposal for an international convention on electronic transactions (A/CN.9/WG.IV/WP.77), she said the working paper was a useful input to the debate; however, the opinion of the Working Group in general and the United Kingdom delegation in particular had been that the idea of a convention should not be allowed to divert attention away from the Working Group's task of preparing uniform rules.

5. Mr. BURMAN (United States of America) said that he concurred with the representative of the United Kingdom as to the importance of the work of the Working Group, which was a major factor in the worldwide effort to enhance trade and commerce for all regions by using the new, computer-based technologies to their fullest advantage. He agreed also that there were substantial differences between national positions on which direction international rules should take with regard to the question of, narrowly, electronic signatures, and, more broadly, authentication in computer-based messaging systems, and expressed the hope that those differences could be resolved within the Commission. If, however, success proved elusive, the Commission's programme of work might have to be re-examined.

6. While some delegations believed that progress could be made in a number of areas of international electronic commerce, it remained to be seen if authentication was one of those areas. If progress was not made, it would not be for lack of interest: the Federal Government's interest and concern was the greater because so many individual states were engaged in the subject that the range of legislative approaches in the United States reflected the United Nations in miniature, and because it remained to be seen which approach or approaches would be successful: pending resolution, the disharmony between those approaches was cause for concern.

7. Ms. SABO (Observer for Canada) said that her delegation supported the work the Working Group had accomplished in its area: the Working Group's rapidly developing subject matter had high priority in Canada's jurisdiction.

8. She supported the views expressed by the representative of the United Kingdom: work on authentication was important, and the Working Group should not be distracted or diverted from it by other proposals.

9. She wondered if it was procedurally irregular for the full Commission to discuss a working paper submitted to a Working Group. She wondered also if it was irregular for a working paper to suggest new work for a Working Group when that Working Group was already carrying out its mandated task. In any case, her delegation saw no pressing need to develop a convention that would essentially reproduce the principles and ideas agreed to in the Model Law on Electronic Commerce, as the Model Law was serving its purpose well.

10. She reserved her delegation's right to respond in full to the proposals in document A/CN.9/WG.IV/WP.77 within the Working Group and in the light of other delegations' comments.

11. Mr. TELL (France) urged the Working Group to continue its work on electronic signatures in the manner and along the lines decided by the Commission in 1996, and expressed his delegation's support for the conclusions it had reached in document A/CN.9/446.

12. He said his Government would take an official position on document A/CN.9/WG.IV/WP.77 once it had officially received that document, i.e. when it had received the French version of the document.

13. He recalled that under the heading "Future work", paragraph 212 of the report of the Working Group mentioned a proposal that the Working Group might consider preparing an international convention based on the Model Law and the Uniform Rules. Thus, he believed he could not do otherwise than reserve his delegation's position in respect of a proposal that was not officially before the Commission.

14. In the interim, his delegation's position was to stress that the Working Group's approach to the issue of electronic signatures must be media-neutral; therefore, the evolving nature of authentication technology was no reason for saying that work on the subject was premature or that there was no point in doing it. That said, he believed that for the time being, given the current situation in the field, it was out of the question to attempt to codify the provisions of the 1996 Model Law in an international convention. He supported that point of view by adducing the proposal for a European Parliament and Council directive referred to by the representative of United Kingdom, but stressed that there was no objection in principle to dealing with some matters, but not the matter in question, by means of a convention. The preference in Europe had been to produce the proposal in the form of a directive; it would therefore be up to the legislatures of the member States to transform its provisions into their own domestic law.

15. He stressed that any future instrument on electronic commerce must include consumer protection, but must in no way prevail over existing specific or general consumer protection legislation in States, or substitute for it, or claim to substitute for it. In a European context, the specific legislation was that enacted pursuant to Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, which was currently in force. He reminded the Commission that States members of the European Union were ineluctably bound to transform directives into domestic law as quickly as possible.

16. Mr. HERRMANN (Secretary of the Commission), in the light of the comments by the observer for Canada concerning possible irregularities in procedure in respect of working paper A/CN.9/WG.IV/WP.77, suggested that members should indicate whether they were prepared to discuss its contents given that it appeared that not all delegations had been fully informed of them. He expressed the opinion that discussion of the working paper in the Commission should not be barred on the grounds that it had been submitted to a working group. He suggested that the representative of the United States should summarize the working paper so that the Commission could come to an informed decision on whether or where to discuss it.

17. Mr. RENGER (Germany) expressed support for the position taken by the representative of the United Kingdom: the Working Group should not be diverted from its work on electronic commerce.

18. Germany was working on national legislation on electronic commerce; it was involved in the work on the proposal for a European directive on electronic signatures referred to by the representative of the United Kingdom; and naturally it was working on the matter within the Commission and the Working Group. The proposal for a convention would be a diversion of that work at all three levels.

19. Working paper A/CN.9/WG.IV/WP.77 appeared to suggest that the terms of reference of the Working Group should be significantly expanded, begging a procedural question, with an obvious answer, of who should set those terms of reference. If an expansion of the Working Group's terms of reference had been the aim, a formal proposal should have been put to the full Commission. It would be unacceptable to present such an expansion of terms of reference to the Commission as a fait accompli, and the Commission should therefore discuss the proposal now.

20. Mr. BURMAN (United States of America) said that the Commission's Model Law had proved to be a success: however, his delegation's concern was that in that form it might take too long to realize, and so was seeking other means to implement the same provisions.

21. He explained that it had never been his delegation's expectation or intention that representatives should be in a position to discuss working paper A/CN.9/WG.IV/WP.77 at the current session of the Commission, nor did it wish that they should. He agreed with the representative of Germany that indeed it was the Commission that was responsible for setting its working groups' terms of reference, and denied that his delegation had sought to expand those terms of

reference by means of the working paper or to divert the working group away from its work.

22. His country shared a concern with many others about the proliferation of rules, regulations, enabling legislation and laws for the broad range of authentication procedures called "electronic signatures". However, the proposals in the working paper had been premised on another factor: a desire to incorporate as many provisions as possible of the Model Law into a convention format in order to boost them and raise their visibility on the world scene, and to speed adoption worldwide of the principles in the Model Law.

23. He recalled that in 1996 his delegation had taken the contrary position, saying then that it was premature to consider converting the Model Law into a convention. However, times had changed, and rapidly; in that connection, he recalled his earlier remarks about the rather alarming and commerce-damaging disharmony over electronic commerce between the states of the United States. The same process was occurring in and between other countries also: non-uniformity appeared to be the rule rather than the exception. Worse, the rapid rate of change in the field and increasing globalization showed up any inadequacies in the law that much faster, and those inadequacies could annihilate the advantages to be gained from electronic commerce.

24. On the other hand, the increasing reliance on the Model Law by many state legislatures within the United States was to be welcomed: at last there was a single common denominator, and one which enhanced awareness of the Commission and its work.

25. In the working paper, only those provisions of the Model Law that were widely supported had been included as candidates for a convention, although such other provisions as enjoyed consensus in the Commission could be added; there was no question of renegotiating the Model Law in any sense. In support of the latter assertion, he noted that the proposal included a provision to which the United States itself objected.

26. His delegation wished to determine, on an informal basis only and without taking the time of the Working Group, whether other countries from various regions would support the idea of a convention. It was also putting its proposal to other countries directly, with the aim of making possible an informed discussion on the sidelines of the Working Group; nevertheless, his delegation accepted that other countries might not wish to take up the proposal in the context of the Commission, or of its Working Group. His delegation's first choice would be to carry the work forward within the body responsible for drafting the Model Law, and so had presented it first to that body, informally; however, it believed that the issue was so important and urgent that it would pursue the matter in other appropriate forums if necessary.

27. Mr ZANKER (Australia) said that his delegation supported the work of the Working Group on Electronic Commerce, particularly its Model Law on Electronic Commerce, whose articles 5, 6, 7, 8, 10, 11 and 15 had been recommended for incorporation in Australian domestic law by a specially appointed expert panel. Proceeding on the assumption that paper-based and electronic commerce should be treated equally, the Australian expert group had also recommended that

comprehensive framework legislation on electronic commerce should be broad in its operation and apply to data messages and trade and commerce. His Government was actively committed to developing electronic commerce in Australian society and to maintaining consistency between domestic and international law in that field. It supported a media-neutral approach to the drafting of uniform rules on the legal issues of digital signatures and certification authorities. Like the Model Law, the uniform rules should provide guidance rather than impose regulations with a view to facilitating the development of electronic commerce.

28. His delegation had no objection to the United States proposal (A/CN.9/WG.IV/WP.77); a convention, however, would have no impact on the incorporation of the Model Law in Australian domestic law, which as he had indicated, was already under way. Certain aspects of the United States proposal went far beyond the content of the Model Law, for example the proposals concerning non-discrimination and unnecessary barriers to trade, which were being explored by the World Trade Organization in the context of its own study of electronic commerce. Some thought should be given to whether it was necessary for the Commission to address such issues or whether it was preferable to build on its Model Law, which already represented a considerable achievement.

29. Mr. PEREZ (Colombia) said he disagreed with the United States proposal. The Commission's work on the Model Law in the past year had been fruitful; a change in course was not warranted at present. Indeed, in Colombia, a broadly based study of the background documentation for the Model Law had led to the introduction of a draft law on electronic commerce in the Congress.

30. Mr. KÖNKKÖLÄ (Finland) said that the work of the Working Group was highly significant and should continue in the same direction. His Government did not wish to rule out the possibility of adopting a convention on electronic commerce; however, it had been unable to give full consideration to the proposal thus far. For the time being, the matter should be debated within the Working Group. Technology neutrality should be a guiding principle in the drafting of the uniform rules. It might be practical to focus initially on legal questions concerning digital signatures until information about other electronic signature technologies could be gathered.

31. Mr. RENGER (Germany) said he supported the remarks made by the representative of Australia. In the early stages of the development of electronic commerce, States should not be bound by an international convention, which was an extremely inflexible type of legal instrument.

32. Mr. CHOUKRI (Observer for Morocco) said that, while the United States proposal was consistent with the Commission's position on the uniformity of trade law, the question of electronic commerce was too complex to consider drafting a convention just yet. For the time being, the Commission should attempt to address the problems of, inter alia, digital signatures, incorporation by reference, cryptography and technological developments within the context of the uniform rules. An international convention on the subject might be considered at a later date.

33. Mr. MAZZONI (Italy) said that his delegation found the United States proposal interesting but was still awaiting instructions from its Government in that regard.

34. Ms. GUREYEVA (Russian Federation) said that, two years earlier, she herself had suggested that, at some stage, it would be necessary to codify the norms on electronic commerce; at the time, the United States representative had not shared her views. In any case, at a time when countries were at such varying levels of technological sophistication, it was still premature to discuss a convention. In fact, a debate on a convention might impede the Commission in the completion of its basic task of drafting uniform rules.

35. Mr. GILL (India) said that his delegation agreed with the preliminary conclusions contained in section III of the report of the Working Group and supported the programme of work as planned. He advised against drafting a convention while countries were still in the process of incorporating the Model Law in their legal systems. The Model Law afforded countries some flexibility, which was all that was necessary for the time being. The question of a convention could be debated further by the Working Group.

36. Mr. MARADIAGA (Honduras) agreed that the question of a convention should be discussed by the Working Group. The United States proposal was positive and should not be rejected out of hand; however, it was unrealistic at a time when many countries, including his own, had still not managed to incorporate all the provisions of the Model Law in their domestic legal systems. Perhaps the idea of a convention could be introduced as a topic for future debate.

The meeting was suspended at 4.20 and resumed at 4.55 p.m.

37. Mr. ABASCAL ZAMORA (Mexico) asked for clarification of the Commission's current position on the United States proposal. He had been under the impression that there was still a possibility that the Working Group would discuss the proposal at some point, since the Working Group had been entrusted, according to paragraph 250 of the Commission's report on the work of its thirtieth session (A/52/17), with the preparation of uniform rules, without any specification as to the form those rules should take. Mexico felt that the United States proposal should be discussed in the Working Group, which could make a recommendation to the Commission on the type of document it proposed for adoption.

38. Mr. HERRMANN (Secretary of the Commission) agreed that during the previous session the Commission had left open the question of the final form of the final document. He said that the Working Group's mandate did not cover as wide a range of issues as those the United States wished to include in an international convention on electronic transactions.

39. The Commission's position appeared to concur with that of the secretariat. The United States proposal seemed to be based on the premise that a Convention would be more quickly accepted than a Model Law; in his experience, that was not always the case.

40. Furthermore, the mere fact that the Commission took steps to convert the Model Law into a convention would divert attention away from the Model Law, and thereby impede, rather than accelerate, the proliferation of the text.

41. He was concerned that if another organization sponsored a convention on electronic commerce, mirroring the Commission's Model Law, an undesirably competitive atmosphere would prevail between the organizations.

42. Mr. BURMAN (United States of America) noted that there were substantial differences in the track records of model laws. In the rapidly developing field of electronic commerce, it was far from certain that the important provisions of the Commission's Model Law would be retained by many States. It was not only a question of the speed of implementation, but also the degree of harmonization of laws which guaranteed progress. In the absence of a convention, many countries supporting the Model Law might lack sufficient commonality in their legal provisions to establish the legal infrastructure for the promotion of electronic commerce.

43. He also wished to clarify the apparent misunderstanding that it was the United States delegation which had suggested that the subject might be taken up in another international forum. In fact, there had been other States which, in consultation with the United States, had made that proposal. His delegation had expressed the view that the work should remain within the Commission.

44. Electronic commerce had become an increasingly attractive field to several parties outside the Commission, and it was very difficult to restrict it to a small group of active organizations. Driven by a sense of responsibility, his delegation had felt it prudent to raise the issue in the Commission.

45. He assumed that subsequent discussions on the topic would be conducted informally, and his delegation did not intend to allow such discussions to interfere with the regular work of the Working Group. It was to be hoped that any future consideration of a convention format would be carried out in the Commission, and not elsewhere.

46. Mr. ABASCAL ZAMORA (Mexico) said that in principle he opposed the idea that the uniform rules should take the form of a convention; however, he was most concerned that the Working Group had been deprived of the freedom to decide on whether the Model Law would be converted into a Convention.

47. He was also concerned that other States which were not present during the current discussion might not be sufficiently informed of the developments.

48. The CHAIRMAN said that, in general, the representative of Mexico was correct in his perception of the procedures to be followed, and it was up to the Commission to issue instructions to the Working Group.

49. He invited the members of the Commission to comment on the proposals contained in document A/CN.9/450, entitled "Possible addition to the UNCITRAL Model Law on Electronic Commerce: draft provision on incorporation by reference".

50. Mr. GILL (India) said that his delegation had no objection to the insertion into the Model Law on Electronic Commerce of a new article 5 bis on incorporation by reference as adopted by the Working Group, with an explanatory note to be added to the Guide to the enactment of the Model Law.

51. Ms. BRELIER (France) said that her delegation was in favour of the insertion of a new article 5 bis as set out in annex I to the document, in the Model Law. The secretariat's amendment was more precise; however, if a majority emerged in favour of the earlier language, France would have no major objection.

52. Article 5 bis would produce only the effects authorized by domestic law, in particular, those concerning the conditions of opposability to the terms incorporated. Even though the inclusion of article 5 bis could be viewed as neutral in normative terms, it would clearly be useful because it set out the principle of recognition of the legal effects of clauses under incorporation by reference, and that was the prevailing approach to the Model Law.

53. Mr. SORIEUL (International Trade Law Branch) explained that the secretariat had held the view that the decision was to maintain the mandate of the Working Group on uniform rules for digital signatures and other electronic signatures in its current form. He said that experts in the Working Group who were familiar with work on electronic commerce under way in other organizations were not prevented from considering the various alternatives which were open for future work, nor were they prevented from considering the United States proposal.

54. In summarizing the views of previous speakers, he said there appeared to be a common understanding that no mandate existed for the preparation of a convention at the current stage. If the Working Group wished to comment on the United States proposal, or make recommendations based on that proposal, it was free to do so. At its next session, the Commission could then rule on the merit of the proposals submitted by the Working Group.

55. Turning to the issue of the draft provision before the Commission, he said that following extremely detailed discussions the Working Group had adopted article 5 bis. After reconsidering that proposal, the secretariat had determined that the wording was not sufficiently clear on the issue of legal effects and felt that the text would not have the required impact in its current form. The secretariat had suggested a slight modification to further explain the meaning it wished to convey by the term "incorporation of reference", and that alternative wording had been set out in paragraph 7 of the note by the Secretariat in document A/CN.9/450.

56. In addition, the Commission was called upon to rule on a completely new draft section set out in annex II to the document, which had not been considered by the Working Group. The draft section had been prepared by the secretariat, pursuant to a decision made by the Working Group at its thirty-second session. It had been drafted in such a way that it would be applicable regardless of whether the Commission supported the original language of the Working Group in annex I or the alternative proposal submitted by the secretariat in paragraph 7 of the note.

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57. Mr. MARADIAGA (Honduras) said that the document had clearly stated the accomplishments of the Commission, and the explanation provided by the secretariat was also helpful. Referring to paragraph 7 of the note, he suggested that the text should be rephrased in more positive terms.

58. Mr. SORIEUL (International Trade Law Branch) said that all parties would have preferred using positive terms, but it had taken a considerable amount of time to reach an agreement on the nature of the recognition of incorporation by reference.

59. It had been considered more realistic to confine the language to the most cautious terms possible by referring the whole problem to national law, and thereby avoid having to take a position on the juridical value of "incorporation by reference".

60. Mr. LEE (Singapore) said that his Government had recently introduced in Parliament a bill on electronic transfers, which was substantially based on the UNCITRAL Model Law. Electronic commerce relied heavily on incorporation by reference, a technique widely used in traditional paper-based commerce. However, many countries had already established their own rules to govern the use of such techniques in the context of paper-based commerce. The inclusion in the Model Law of detailed provisions on incorporation by reference might therefore create a situation in which countries had separate legal regimes for incorporation by reference in electronic commerce on the one hand and paper-based commerce on the other, which might lead to discrimination against one or the other form of commerce. His delegation therefore supported the inclusion of the proposed new article 5 bis as drafted by the secretariat. It also approved of the text prepared by the secretariat which was contained in annex II.

61. Mr. ABASACAL ZAMORA (Mexico) said that, while his delegation supported the proposed article 5 bis as drafted by the secretariat, in keeping with the Commission's normal practice, the text should first be circulated to member Governments for comments before its formal adoption at the Commission's thirty-second session.

62. Ms. ALLEN (United Kingdom) said that it was time for the Commission to conclude its consideration of the draft provision on incorporation by reference and move on to other topics. Her understanding was that the Commission did not intend to include in the Model Law any reference to the restrictions which certain jurisdictions placed on incorporation by reference. The United Kingdom had earlier proposed a draft text on that subject which, unfortunately, had become too complex and thus likely to upset the balance of the Model Law. However, by adopting a minimalist approach and assuming that legislators would understand what was meant by incorporation by reference, the text adopted by the Working Group had gone too far in the opposite direction. The formulation proposed by the secretariat in paragraph 7, while better in some respects, was somewhat confusing and failed to separate the process of incorporation from its legal effect. She therefore wished to suggest the following formulation for article 5 bis:

> "Where a data message refers to information recorded elsewhere, the data message shall be deemed to incorporate such information as if it were fully

expressed in the data message. Such information shall not be denied legal effect, validity or enforceability solely on the grounds that it is incorporated by reference in a data message."

63. Mr. ZANKER (Australia) said that the word "purported" in the secretariat's formulation of article 5 bis should be replaced by "purporting" or "which purports". He also wished to draw attention to the difference between merely including in a contract a reference to provisions of another instrument and formally incorporating those provisions into the contract. Indeed, the Commission might wish to consider the inclusion in the draft article of a definition of incorporation by reference. His preference would be for the formulation suggested by the Working Group.

64. Mr. RESTREPO-URIBE (Colombia) said he wondered whether the term "fuerza ejecutoria" was the correct Spanish rendering for the English term "enforceability". During its recent debate on the Model Law, the Colombian legislature had decided to use the term "fuerza obligatoria".

65. Mr. PEREZ (Colombia) said that the first paragraph of annex II should contain a definition of the concept of incorporation by reference in order to provide a framework for the discussion that followed. It would also be desirable to replace such general terms as "por lo general" ("usually") and "principalmente" ("heavily") by more specific terms.

66. Mr. SORIEUL (International Trade Law Branch), referring to the statement by the representative of Australia concerning the difference between a mere reference in a contract to the provisions contained in another instrument and the incorporation in the contract of those provisions, said that the secretariat had sought to convey in its formulation the idea that an intention to produce certain legal effects must be present in the act of incorporation by reference. He acknowledged, however, that English was not the first language of the drafters of the text and that that idea might not have been conveyed effectively.

67. On the question of the rendering in Spanish of the term "enforceability", that choice was perhaps best left to national legislators. Delegations from Spanish-speaking countries might also wish to decide among themselves on the best rendering.

68. Mr. KASHIWAGI (Japan) said that the proposed new article 5 bis was substantially acceptable and would neither affect the interpretation of domestic contract law nor override domestic consumer-protection laws. The term "incorporation by reference", however, might be unfamiliar to Japanese legislators and the more descriptive formulation suggested by the secretariat in paragraph 7 was therefore preferable.

The meeting rose at 6.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 644th MEETING

Held at Headquarters, New York,
on Tuesday, 9 June 1998 at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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ELECTRONIC COMMERCE (continued)

RECEIVABLES FINANCING: ASSIGNMENT OF RECEIVABLES

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80785 (E)

The meeting was called to order at 10.15 a.m.

ELECTRONIC COMMERCE (continued) (A/CN.9/446 and A/CN.9/450)

Article 5 bis. Incorporation by reference (A/CN.9/450)

1. Ms. ALLEN (United Kingdom) said that although her delegation would have preferred to go in a different direction with regard to the article on incorporation by reference, it would be prepared to accept the text proposed by the secretariat (A/CN.9/450, para. 7), with the proviso that the secretariat would reconsider the use of the word "purported", as requested by the representative of Australia at the previous meeting.

2. Mr. MARADIAGA (Honduras) said that his delegation would also accept the drafting in paragraph 7 because of the importance of concluding the deliberations and making the new text of the Model Law on Electronic Commerce available.

3. Mr. CHOUKRI (Observer for Morocco) said that his delegation would prefer to find a positive formulation for the concept contained in article 5 bis and proposed the following wording: "Incorporation by reference shall have the same validity and enforceability as data messages in the information message."

4. Mr. SORIEUL (International Trade Law Branch) said that a positive formulation would of course be preferable, but that the Working Group had reluctantly decided that only a negative formulation would accurately convey the desired meaning. He doubted that it would be possible to come up with an acceptable positive drafting without further study.

5. Mr. BURMAN (United States of America) said that his delegation's views echoed those of the United Kingdom. Although some of the alternative drafting proposed was interesting, the bulk of support was clearly behind the drafting from the secretariat. It was important to conclude work on the Model Law at the current session, and there were no new issues to be discussed, all the possibilities had been thoroughly covered. Perhaps it could be reflected in the guide to enactment that other systems of mandatory rules on incorporation by reference placed the same obligation on a party to make reasonable efforts to ascertain the text of the information incorporated by reference, so that a party could not avoid its obligations simply by asserting that it did not have that knowledge, while having made no attempt to do so.

6. Mr. SORIEUL (International Trade Law Branch), noting that the Commission had reached the final adoption stage for the text in question, said that there would be no opportunity to incorporate suggestions into a new version of the document. Unless there were specific proposals, the matter would have to be referred to the Working Group again.

7. Mr. KONKAOLA (Finland) said that his delegation supported the version of article 5 bis proposed by the secretariat. He wondered if adding a provision to the Model Law could have the effect of weakening it, however, and whether the

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aim of that provision could be achieved through dissemination of information to Governments instead.

8. Mr. SORIEUL (International Trade Law Branch) said that the Model Law on Electronic Commerce had always been viewed as slightly different in form from the others in that it was open-ended and that updated versions had been issued. Thus adding an article would not violate the general concept of that text, but it would make it necessary to issue an addendum to the 1996 text of the Model Law containing the 1998 amended version. He was not sure how article 5 bis would be incorporated into an update.

9. Ms. SABO (Observer for Canada) said that her delegation did not see the need for the article on incorporation by reference, although it was clear that other States did. The proposals raised policy questions, and her delegation would prefer to see it made clear that the same set of rules governed incorporation by reference for electronic transactions as for paper-based transactions. The version proposed by the secretariat seemed to do the job, if it was understood that "solely" meant that other rules for paper-based transactions applied. She commended the secretariat for its work in preparing the addition to the guide to enactment contained in annex II of A/CN.9/450, and suggested that the text of the guide might reflect policy questions more clearly.

10. On the question of how the text should be presented, she would be interested to hear the views of the secretariat and other delegations on possible titles and ways of publicizing it.

11. Mr. RENGER (Germany) said that, like the representative of Canada, he was not convinced of the benefits of such a provision, as it could be misleading. Therefore, although he did not object, he could not actively support the proposal. Consensus was required in contract law, and he did not believe that it was absolutely clear what kinds of information were included and whether the other party was aware of that information.

12. As for the presentation of the article, he recalled that other model laws had been submitted to the General Assembly in the form of a resolution, but he wondered whether that article warranted the drafting of a separate resolution.

13. Mr. HERRMANN (Secretary of the Commission) said that the article would be incorporated in a paragraph of the resolution on the work of the Commission.

14. Ms. MUSOLINO (Australia) said that her delegation wished to propose two alternative versions of the text which might improve its clarity. The first alternative would read:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect but is referred to within that data message as forming part of that message."

The second alternative was:

> "If a data message refers to information as forming part of it, but that information is not fully contained in that data message, then the information so referred to shall not be denied legal effect, validity or enforceability solely on the ground that it is not fully stated in the data message."

15. Mr. MARKUS (Observer for Switzerland) said that his delegation preferred the wording proposed by the secretariat. It should not be forgotten that the provision was meant merely as a non-discrimination rule. Reference by an electronic text to an electronic text should not be subject to discrimination under the law simply because it was so incorporated. The secretariat's proposal was of the sort found in many legal texts: formulated simply, with a high level of abstraction. In his view, the other proposals tended to be too complicated or too descriptive and employed legal notions which went further than the meaning sought by the Commission.

16. Mr. ENOUGA (Cameroon) said that his delegation preferred a more positive formulation: "The information is valid, enforceable and gives rise to legal effects despite its incorporation by reference in a data message."

17. Mr. BURMAN (United States of America) said that his delegation endorsed the views expressed by the Observer for Switzerland. The secretariat's proposal had been carefully and clearly drafted to reflect an extended discussion in the Working Group, which was made up of persons actively engaged in that sphere of commercial law. Members should therefore hesitate before attempting to redraft from the floor. It had been understood from the outset that there would be additions to the Model Law on Electronic Commerce; the secretariat had pointed out that some might merit special resolutions. In his delegation's view, however, the provision under consideration did not, and should simply be incorporated in the Commission's annual report to the Sixth Committee.

18. Mr. ENIE (Observer for Gabon) agreed with the representative of the United States of America that the Commission should either adopt or reject the provision; it was not appropriate to redraft it at the current stage. The second proposal put forward by the representative of Australia was not substantially different from that of the Working Group; it was simply longer and more descriptive. His delegation preferred the secretariat's proposal: it was flexible, logical, and amenable to interpretation by the various legal systems.

19. Mr. GILL (India) said that although several good proposals had been put forward by delegations, he, too, supported the draft provision formulated by the secretariat: it was self-contained, simple and well-drafted. He also agreed that the new article should merely be mentioned in a general resolution and did not merit a special resolution of its own.

20. Ms. NIKANJAM (Islamic Republic of Iran) said that although her delegation was fully satisfied with the wording proposed by the secretariat, Australia's first proposal was also acceptable.

21. Mr. SORIEUL (International Trade Law Branch) said that, to eliminate ambiguity, a minor revision should be made to the secretariat's version of draft provision 5 bis: the word "purported" should be changed to "purporting".

22. He thanked the Observer for Canada for her suggestions concerning the text of annex II, which could be adopted subject to those revisions. The Working Group's discussion, held over years, on the matter of incorporation by reference had shown that agreement could not be reached. It had been impossible to formulate a real law, and the Working Group had at last settled for the establishment of a non-discrimination rule which provided only that the same rule should apply, whatever the domestic legal framework, to incorporations by reference whether contained in a data message or in a conventional text. That was indeed a minor accomplishment; there was no cause either to change the title of the law or to issue a new booklet. The secretariat planned to include the new article in an annex to the existing document, and mention would be made of its adoption only in a general resolution to be reviewed by the Sixth Committee.

23. The CHAIRMAN noted that most delegations, even those which had submitted other proposals, seemed to prefer draft provision 5 bis as formulated by the secretariat and agreed that it should be mentioned in a General Assembly resolution. If he heard no objection, he would take it that the members wished to adopt new article 5 bis, as orally revised, as well as the related material that was to be inserted in the Guide to Enactment of the Model Law on Electronic Commerce, subject to the modifications discussed.

24. It was so decided.

RECEIVABLES FINANCING: ASSIGNMENT OF RECEIVABLES (A/CN.9/445 and 447)

25. The CHAIRMAN drew attention to the reports of the Working Group on International Contract Practices on the work of its twenty-seventh and twenty-eighth sessions, held in Vienna in 1997 and New York in 1998 (A/CN.9/445 and A/CN.9/447), at which the Working Group had reviewed the revised articles of a draft Convention on Assignment in Receivables Financing.

26. Mr. BAZINAS (International Trade Law Branch) said that, at its twenty-eighth session the Working Group on International Contract Practices had adopted, in substance, those provisions of the draft Convention on Assignment in Receivables Financing which dealt with the relationship between the assignor and the assignee as well as those which dealt with debtor protection. It had also made substantial progress on a number of other matters, including the validity of assignments of future receivables, of receivables not individually identified (bulk assignments) and of those which were concluded in violation of or despite an anti-assignment clause contained in the contract under which the assigned receivables arose. A number of issues remained to be resolved, among them contractual receivables, tort receivables, deposit accounts, tax receivables and insurance receivables.

27. A central concern had been the matter of public policy with regard to debtor protection. The Working Group had determined that the draft Convention should introduce a threshold for the protection of debtors that was high enough

to meet the concerns of all States and make it unnecessary for them to fall back on general public policy reservations to ensure adequate protection.

28. Another major issue was that of conflicts of priority among several claimants of the same receivables, either among several assignees of the same receivables from the same assignor or between assignees and creditors of the assignor or the insolvency administrator. The Working Group had agreed on a bifurcated approach which would incorporate two substantive law priority rules, one based on the time of assignment and one on the time of registration. Under that approach, States adopting the draft Convention could choose between them. A private international law priority rule would also refer conflicts of priority to the law of the assignor's location.

29. The Hague Conference on International Private Law, in cooperation with the Commission secretariat, had convened a meeting of experts to discuss issues of private international law as related to assignment. That group had concluded, inter alia, that the private international law rule dealing with priority based on the assignor's location was one which could function in the context of the draft Convention, provided that its application was limited to the transactions falling within its scope.

30. It should also be mentioned that the Working Group had attracted the attention of the international trade and finance community, since its work was likely to increase access to lower-cost credit in many countries where the only asset parties could offer as security for credit were the receivables arising from the sale or other use of their products.

The meeting was suspended at 11.20 a.m. and resumed at 11.55 a.m.

31. Mr. BURMAN (United States of America) said that the draft Convention on Assignment in Receivables Financing could significantly increase the availability of commercial credits to many markets. The Working Group on International Contract Practices had made a great deal of progress in drafting key provisions on the assignability of future receivables, bulk assignments and treatment of non-assignment clauses. At its next session, the Working Group should carefully consider limiting the scope of the draft Convention because if the draft Convention was expanded to cover a variety of other receivables, it would involve almost every commercial sector in every country.

32. His delegation commended the way in which the Working Group had dealt with the treatment of priority rules. The best approach seemed to be a combination of options. His delegation welcomed the recent discussions that had been held under the auspices of the Commission and the Hague Conference on Private International Law; further cooperation between the Commission and the Conference would help provide practical solutions to the legal issues involved in assignment in receivables financing.

33. Ms. FOLLIOT (France) said that while her delegation approved the general direction taken by the Working Group on International Contract Practices, a number of technical aspects still had to be discussed or considered in greater depth. France believed that the draft articles should take the form of a convention. Work on the draft Convention should be completed by the year 2000.

Her delegation had been pleased to learn of the joint work that had been carried out by the Commission and the Hague Conference on International Private Law; the report on that work should be submitted for consideration at the next session of the Working Group.

34. Ms. SABO (Observer for Canada) said that her delegation had noted the high level of expertise and participation of delegations of both member and observer States. The representatives of international organizations, such as the European Federation of National Factoring Associations, the Commercial Finance Association and Factors Chain International, had made important contributions to the deliberations of the Working Group. While agreement had been achieved on some fundamental issues, much work remained to be done. The holding of two more sessions of the Working Group would help to reach a consensus on a number of very difficult issues still to be considered. If a solid consensus could be ensured only by restricting the scope of the draft Convention, her delegation would favour that approach.

35. With respect to the options set out in the annex to document A/CN.9/447, her delegation was in favour of a registry system, since that was the system used in Canada. However, her delegation recognized that, at the current stage, such an approach posed virtually insurmountable problems for many States. The conflicts rule by way of default should be workable. Her delegation looked forward to working with the secretariat and other States interested in the options approach.

36. Canada welcomed the successful cooperation between the Commission and the Hague Conference on Private International Law. Such mutually advantageous cooperation should continue. Her delegation looked forward to studying the report on the conclusions of the meeting of experts at the next session of the Working Group.

37. Ms. ALLEN (United Kingdom) said that her delegation welcomed the secretariat's suggestion as to how priority among competing claimants to an assigned receivable should be determined. The options approach was a pragmatic answer to the divergent views that had been expressed in the Working Group. Like the representative of the United States, she believed that the scope of the draft Convention should be relatively modest and should not attempt to encompass such issues as non-contractual receivables.

38. Mr. GILL (India) said that, while the Working Group on International Contract Practices had reached agreement in principle on several important issues, it still had to consider the very important question of the effects of assignments on third parties. The Working Group should closely examine the idea that registration should serve as the basis for determining the time of assignment. Those and other issues should be discussed by the Working Group and the Commission at their forthcoming sessions with a view to finding an acceptable but efficient system of uniform law on assignment in receivables financing. His delegation supported the secretariat's proposal to hold two further sessions of the Working Group in order to complete work on the draft Convention.

39. His delegation believed that the final form of the draft should be a convention. The purpose of the rules of private international law was to fill in the gaps, if any, in the substantive rules laid down in the future convention. Statutory rules of States parties would be given primacy with regard to the conflict of priority between the insolvency administrator and the assignees.

40. Mr. MARKUS (Observer for Switzerland) said that his delegation regretted that the Working Group had not been able to agree on uniform rules with regard to the important question of priority, since uniform rules would facilitate international trade. With regard to the form of assignment, the Working Group should find a solution that was acceptable to all.

41. With regard to territorial scope, proposals had been made to find a solution similar to the one contained in the United Nations Convention on Contracts for the International Sales of Goods (the Vienna Sales Convention). His delegation wished to point out that such a solution would be very difficult, since the assignment of proceeds dealt with a three-party relationship and not the two-party relationship as in the Vienna Sales Convention. It might therefore be necessary to consider other solutions that did not use the method of the applicable-law rule.

42. Finally, his delegation commended the fruitful cooperation between the Commission and the Hague Conference on Private International Law. Such cooperation would enable the two bodies to make use of each other's expertise.

43. Mr. OLIVENCIA RUIZ (Spain) said that his delegation attached great importance to the deliberations of the Working Group and commended the progress that it had achieved in preparing the text of the draft Convention. The Working Group at its next session should finalize the text so that the Commission could consider it at its thirty-second session.

44. Mr. KLEBER (Observer for Venezuela) said that his delegation considered that the form of a convention would be the best way of giving effect to the draft provisions, since a convention would take account of the context and features of the national legislation of all countries, thus ensuring the uniformity of international trade law.

45. Mr. CHOUKRI (Observer for Morocco) welcomed the draft prepared by the secretariat and expressed the hope that its completion would alleviate the conflict-of-law problems arising in a number of countries. Assignment in receivables financing was among the most important civil law questions, and the novel solutions proposed in the draft text were as yet unknown in many countries, including his own. It was common practice for assignment to take place through formal notification to the assignee and his acceptance in writing. The proposal to include all information relating to the assignment would be very helpful, especially at the international level. He hoped that the secretariat would adhere to its present approach and opt for a non-mandatory system, bearing in mind the civil liability that could be incurred if mistakes were made.

46. The title of the topic had no real meaning in Arabic, and he suggested amending it to read: "Assigning rights in receivables financing".

47. The CHAIRMAN suggested that the Commission should take note with appreciation of the work of the Working Group as reflected in its two reports.

It was so decided.

The discussion covered in the summary record ended at 12.35 p.m.